National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: March 13, 1997

TO: Victoria E. Aguayo, Regional Director, Region 21

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: United Brotherhood of Carpenters & Joiners, of America, Carpenters Local Union No. 1506 (Best Interiors), Case 21-CC-3234

560-2550, 560-2575-6700, 560-7540-8060, 560-7540-8060-6783, 560-7540-8070-3300, 560-7540-8070-5000

This Section 8(b)(4)(i)(ii)(B) case was submitted for advice as to whether the Union violated the Act by displaying a large banner which states, "THIS BUILDING IS FULL OF RATS," in front of three neutral employers' places of business and by refusing to adhere to a properly established reserved gate system.

FACTS

Best Interiors ("Best" or "Employer") is a contractor that installs commercial drywall, metal studs and acoustic ceilings, and whose employees are not represented by any labor organization. According to Best's President, Steve Foran, the United Brotherhood of Carpenters and Joiners of America, Carpenters Local Union No. 1506 ("the Union") has had a long running dispute with Best and has picketed several of Best's jobsites during the past two years, but has never sought to organize Best's employees. The Union asserts, and Best does not deny, that Best does not pay prevailing wages and does not provide its employees with medical benefits.

The Park Place Plaza Jobsite:

In early June 1996,[(1)] the Employer entered into a contract with Amaron Construction ("Amaron") a general contractor, to perform drywall, metal stud and acoustic ceiling work at a jobsite known as the Park Place Plaza ("Park Place"). The job was a renovation project performed inside of at least two tenant-occupied buildings at Park Place. On or about July 9, from approximately 10 a.m. to 12 noon, the Union had at least 50 members picketing in front of the main building at Park Place, 3333 Michelson, with picket signs which read "Unfair, Best Interiors, Carpenters 1506." Later this same day, Amaron sent a letter to the Union via fax and certified mail stating that a reserved gate system had been established at the loading dock 3337 Michelsen Drive, one of the buildings at the Park Place complex. The primary gate under this system was in the rear of an adjacent building, out of sight of anyone entering the main entrance of the 3333 Michelson building. The Region concluded that this was not a valid reserve gate system.

On July 10, Union members arrived at 3333 Michelson at 8 a.m. and began picketing. At approximately 8:10 a.m., an Amaron official told a picket leader that a two-gate system had been established and that the Union had been notified of this by the July 9, letter from Amaron. This was confirmed, and the pickets ceased picketing before 8:30 a.m. On July 11, the Union did not picket at the Park Place complex.

On July 12, three or four union pickets held up a large banner in front of 3333 Michelson, from about 8 or 9 a.m. to 12 noon or 1 p.m. The banner was approximately five feet tall by 20 feet wide. The top line of the banner stated in black letters approximately 8 to 10 inches high, "THIS BUILDING IS." The second line of the banner had red lettering approximately three feet tall which said "FULL OF RATS." The final line stated in black letters approximately three inches tall, "OUR DISPUTE IS WITH BEST INTERIORS. WE ARE NOT ASKING ANY PERSON TO STOP WORK OR REFUSE TO MAKE DELIVERIES." On the final line, the name of the Employer, "Best Interiors" was handwritten in black ink on a red background in lettering that was approximately two inches tall. Beginning on the date that the Union began displaying its banner, tenants of the Park Place complex began to complain to Winthrop Management Director of Operations, Robert

Neghosian, that they were concerned that the Park Place complex was infested with rats. In conjunction with displaying the banner, Union members handed out handbills which stated "3333 Micheslon has Rats in the Building." The handbill declared that Best Interiors did not pay prevailing wages and was, therefore, a "rat" contractor. The Union maintained the "Rats in the Building" banner in front of 3333 Michelson on July 15 and 16. The Union did not picket, handbill, or engage in any other activities at 3333 Michelson on July 12, 15 or 16.

On July 16, at 11:27 a.m., Best notified the Union that it would only be working during the evening hours at 3333 Michelson and asked it to limit its picketing to the hours that Best was at the 3333 Michelson jobsite. However the "Rats in The Building" banner was displayed again in front of 3333 Michelson on July 17, from about 8 or 9 a.m. to 12 noon or 1 p.m. Later this same day, the Employer received a faxed letter from Amaron stating that as a result of tenant complaints regarding the Union's failure to limit its picketing to the reserved gate, Amaron would complete the work that the Employer had been contracted to perform at 3333 Michelson. At 4:02 p.m. on July 17, the Union received a fax from Best stating that Best no longer was working at the 3333 Michelson location and entirely off the jobsite at that address. However, the Union asserts that in the evening of July 17, it received information that Best was working at another jobsite at the Park Place complex, 3349 Michelson.

On July 18, the Union had pickets, but no "Rats in the Building" banner, in front of the 3349 Michelson building beginning at approximately 11 a.m. At 1:58 p.m., Best faxed the Union a letter stating that it was no longer working at the jobsite at 3349 Michelson. At 3:49 p.m., Winthrop Management, the management company that owns and operates the Park Place complex, faxed a letter to the Union stating that Best was no longer working at either 3333 or 3349 Michelson or any other buildings at the Park Place complex. The Union ceased its picketing at 3349 Michelson shortly thereafter and never returned to the Park Place complex.

The San Antonio Community Hospital Jobsite:

In early July the Employer was hired by W.B. Construction, a general contractor, to perform metal stud and drywall installation in the Neonatal Intensive Care Unit extension of San Antonio Community Hospital, ("San Antonio") in Upland, California.

On or about July 21, the Union arrived at San Antonio and placed a large banner across the street and in front of the main entrance to San Antonio's maternity ward. The banner was approximately 4 1/2 feet high by 15 feet wide. The first two lines of the banner stated in bold red letters approximately one foot high, "THIS MEDICAL FACILITY IS FULL OF RATS." Immediately below this, the banner stated in bold red letters approximately four inches high, "CARPENTERS L.U. 1506 HAS A DISPUTE WITH BEST INTERIORS FOR FAILING TO PAY PREVAILING WAGES TO ITS WORKERS." The words "Best Interiors," were handwritten in black letters approximately two inches tall on a red background. This banner remained across the street and in front of San Antonio's maternity ward entrance from 8 a.m. to 12 noon between June 21, and June 26. There was no banner in front of San Antonio's maternity ward entrance between June 26, and July 8, but the Union displayed the banner again at its original location and hours beginning on July 9.

On July 11, San Antonio's counsel filed a request for a preliminary injunction with the United States District Court, Central District of California, in order to prevent the Union from displaying the "Rats in the Medical Facility" banner in front of its maternity ward. The basis for the injunction was San Antonio's assertion that the banner was defamatory in that the use of the word "rat" misleads patients and staff to believe that the hospital was infested with rodents.

On August 7, Foran was informed that the Union was picketing in front of San Antonio and also had placed the "Rats in the Medical Facility" banner across the street and directly in front of the entrance to San Antonio's maternity ward. By a letter dated and mailed to the Union on August 7, and faxed to the Union August 8, the Employer informed the Union that it had established a reserved gate system and gave the Union a plot map. The reserved gate was on 11th Street at a temporary entrance to San Antonio's parking lot near where the Employer parked its construction vehicles for the jobsite. The entrance, which was around the block from San Antonio's maternity ward entrance where the Union had stationed its banner, was clearly visible from the jobsite, and the Region concluded that it did constitute a valid reserve gate system. However, the Union continued to display the banner as it had prior to being notified of the reserved gate system.

On August 9, Judge Robert M. Takasugi of the United States District Court Central District of California, issued an order granting San Antonio's request for a preliminary injunction against the Union regarding the banner inasmuch as the term "rat" in the banner was defamatory to the hospital.(2)

The Court further held that the use of the term "rats" in the Union's banner constituted fraudulent and unlawful conduct under the Norris-La Guardia Act.(3)

On August 15, the Union arrived at San Antonio with a second banner which it displayed next to the original banner. The second banner was approximately four feet high by ten feet wide and stated in bold red letters that were approximately 18 inches tall, "BEST INTERIORS IS A RAT CONTRACTOR." The second banner has been displayed next to the original banner at the same location and during the same hours as the original banner from August 15, 1996 to date.

On August 19, San Antonio's counsel filed an application for Order to Show Cause re Contempt regarding the second banner put up in front of San Antonio by the Union. Judge Takasugi ruled on August 28 that the Union did not violate his original injunction and that the Union properly modified its behavior by erecting the second banner that defines the Employer as a "Rat Contractor."

On September 6, Clint Borell, San Antonio's Head of Personnel, spoke with Foran and informed him that he had received many complaints from doctors and patients regarding the banners, as well as questions from patients, family members of patients, and doctors, as to whether the building was in fact infested by rats. As a result, on September 11, Foran sent another letter to the Union stating that the reserved gate had been relocated further away from San Antonio's maternity ward entrance. However, the Union did not relocate its banners to the reserved gate and continues to display the banners in front of San Antonio's maternity ward entrance to date.

The California Medical Center Jobsite:

In early July, Best was hired by general contractor, Millie and Severson, to perform metal stud and drywall installation at an improvement project at the California Medical Center Hospital, ("Cal Med"), in Los Angeles, California.

On July 18, a large number of union protesters arrived at the Cal Med jobsite and the Union placed a "Rats in the Medical Facility" banner on the sidewalk approximately ten feet from the main entrance driveway of Cal Med. It was identical to the first banner that was displayed at San Antonio. Later this same day, George Granger, Executive Vice President of Millie and Severson, faxed and mailed a letter to the Union, informing the Union that Millie and Severson had set up a reserved gate system for the Employer approximately one city block away from the main driveway entrance to Cal Med. However, the Union did not move the "Rats in the Medical Facility" banner to the reserved gate.(4) Between July 18, and August 26, the "Rats in the Medical Facility" banner remained in front of the main driveway entrance to the hospital from approximately 8 a.m. to 1 p.m. on a daily basis, excluding weekends.

On August 18, President and CEO of Cal Med, Melinda D. Beswick, sent a letter to the Union which stated that the banner had left members of the public and staff with the impression that Cal Med facilities were infested with rodents. The letter went on to inform the Union that Cal Med was aware of the injunction that San Antonio was granted regarding the banner at their facility and warned the Union that if they did not cease displaying the banner, Cal Med would file for a similar injunction. The Union did not respond to this letter.

The Union ceased displaying the "Rats in this Medical Facility" banner on August 26. Between August 26, and September 19, the Union had neither banners nor pickets at the Cal Med jobsite. However, on September 20, about four union members returned to Cal Med's main driveway entrance with a new banner. This second banner was approximately four feet by fifteen feet long. The first line of the banner stated in approximately two foot tall letters, THIS BUILDING IS FULL OF RATS." The term "THIS BUILDING" was underlined. The following three lines stated in black lettering approximately nine inches tall that "CARPENTERS LOCAL 1506 HAS A LABOR DISPUTE WITH RAT CONTRACTOR BEST INTERIORS FOR FAILING TO PAY ALL OF ITS EMPLOYEES PREVAILING WAGES." The second banner continued to be displayed approximately ten feet from Cal Med's main driveway entrance until the Employer completed its work at the jobsite in early November. The

Union never displayed the second banner at or near the Employer's reserved gate.

ACTION

We conclude that the instant Section 8(b)(4)(i)(ii)(B) charge should be dismissed, absent withdrawal, for reasons set forth below.

Section 8(b)(4)(i) and (ii)(B) makes it unlawful for a labor organization or its agents (1) to induce or encourage employees to withhold services from their employer, or (2) to threaten, coerce, or restrain any person where an object is for that person to cease doing business with another employer. The Section proscribes not only picketing but all conduct where it was the union's intent to coerce, threaten or restrain third parties to cease doing business with the neutral employer, or to induce or encourage its employees to stop working, although this need not be the union's sole objective.(5) Whether or not a particular activity is prohibited by Section 8(b)(4) depends inter alia upon the "coercive nature of the conduct, whether it be picketing or otherwise". NLRB v. Fruit and Vegetable Packers, Local 760, 377 U.S. 58, 68 (1964).

Handbilling however has been distinguished from picketing in that picketing usually entails a patrolling of the facility or location involved, and is aimed at inducing those who approach the location of the picketing to take some sympathetic action such as to decide not to enter the facility involved. It is this patrolling/picketing which provokes people to respond without inquiring into the ideas being disseminated and which distinguishes picketing from handbilling and other forms of communication.

This difference between handbilling and picketing, and to what extent handbilling can be coercive was set forth in Florida Gulf Coast Building Trades Council, AFL-CIO (DeBartolo Corp.).(6) Initially, the Board found that the handbilling in DeBartolo that sought to have consumers cease doing business with a secondary employer was a form of economic retaliation and therefore coercive under the Act. The Eleventh Circuit on reviewing the Board's decision, considered whether the statutory interpretation suggested by the Board would cause serious doubts about the constitutionality of Section 8(b)(4).

Thus, the Circuit Court examined the handbilling in DeBartolo, finding that the people distributing the handbills outside the mall were not pressuring or harassing the consumers entering the mall, and thus this situation did not involve any aspects of picketing.(7) The Circuit Court disagreed with the Board's holding that the Union violated the Act by urging consumers to avoid patronizing the mall tenants, hoping to coerce the mall tenants to pressure Wilson's and/or DeBartolo to force High, with whom the Union has a primary dispute, to use Union standards. The Circuit Court noted that a finding of statutory coercion would not control the First Amendment analysis because "for purposes of assessing the First Amendment protection to which communication is entitled, a court must focus on the possible coercion of the listeners, in this case, the consumer."(8) The Circuit Court held that the handbills in the case lacked any elements which could threaten, coerce or restrain the listeners, i.e. the consumers. Based upon the absence of the non-speech elements which have permitted restrictions on labor picketing, and in light of the full First Amendment protection afforded to handbilling and pamphleteering, the Circuit Court concluded that if Section 8(b)(4)(ii)(B) is construed to prohibit certain types of handbilling, serious constitutional questions would arise. The Circuit Court, therefore, examined the statute and legislative history in order to identify whether Congress clearly expressed an affirmative intention to prohibit such speech.

The Circuit Court reviewed the history of the 1959 Amendments to the National Labor Relations Act, focusing on whether Congress intended to proscribe labor publicity. The Senate passed a labor reform bill in both the Eighty-fifth and Eighty-sixth Congress but neither contained any amendments to Section 8(b)(4). In a speech to the Eighty-sixth Congress however, President Eisenhower introduced a bill to close three loopholes in the secondary boycott provisions of the Act. The amendments proposed were to cover the direct coercion of employers to cease or agree to cease doing business with other persons; union pressures directed against secondary employers not otherwise subject to the Act; inducements of individual employees to refuse to perform services with the object of forcing their employers to stop doing business with others; and to make clear that secondary activities were permitted against an employer performing "farmed-out struck work" and, under certain circumstances, against secondary employers engaged in work at a common construction site with the primary employer.(9)

The bill proposed by the Eisenhower Administration (S. 748), was the first Senate bill to propose making it an unfair labor practice to "threaten, coerce, or restrain" a secondary employer. The Secretary of Labor testified in support of the Administration bill, but never made reference to consumer picketing or publicity directed at consumers as reasons for the Section 8(b)(4) amendments. The legislative history reveals that the proponents of the amendments to Section 8(b)(4) were concerned with non-consumer picketing and direct economic actions such as strikes, when they proposed to amend that section. There was no indication that they intended to restrict distribution of publicity to consumers. It was only during the debate by the full Senate after President Eisenhower called for restrictions on secondary consumer picketing in a speech on August 6, 1959, that discussion concerning any form of restriction on consumer appeals first arose.

The Eisenhower Administration's proposal concerning secondary boycotts were included in the bill passed by the House of Representative, the Landrum-Griffin bill. Congressman Griffin, however, never mentioned consumer handbilling as one of the abuses which he thought required the secondary boycott amendments. The debate in the House of Representatives makes it clear that Representative Griffin: 1) had in mind only prohibiting consumer ***picketing*** by the amendments he proposed to Section 8(b)(4); and 2) recognized that his bill was limited by the constitutional right of free speech.

The amendments contained in the Landrum-Griffin bill were agreed to by the House/Senate conference committee. In response to the fears of opponents of the amendments that these amendments might restrict speech unaccompanied by non-speech conduct, the conference committee drafted the publicity proviso. The publicity proviso protects union appeals made through handbilling, advertising, and other non-picketing publicity to consumers not to deal with a secondary employer who has a "producer-distributor" relationship with a primary employer. The publicity proviso thus was inserted to clarify that non-picketing publicity was not prohibited, and to allay the fears of opponents of the amendments that such speech would be restricted. In explaining the conference agreement, Senator Kennedy stated:

We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activities short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in the newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site.[(10)]

The Circuit Court thus concluded that there was no indication that Congress intended to proscribe entirely peaceful and orderly distribution of handbills as in DeBartolo. Therefore, the Circuit Court denied the Board's order, rejecting the Board's holding that handbilling alone could be coercive conduct within the meaning of Section 8(b)(4)(ii)(B) of the Act. The Court very clearly held that the prohibiting language does not reach any kind of non picketing publicity.

In DeBartolo Corp. v. Florida Building & Construction Trades Council (DeBartolo II), 485 U.S. 568, 128 LRRM 2008 (l988), the Supreme Court held that the Court of Appeals for the Eleventh Circuit did not err in construing Section 8(b)(4)(ii)(B) of the Act as not prohibiting peaceful handbilling, urging a consumer boycott of a neutral employer, where such handbilling was unaccompanied by picketing. The Court stated that mere persuasion of customers not to patronize neutral establishments does not thereby coerce the establishments within the meaning of Section 8(b)(4)(ii). The Court based this conclusion on the legislative history of the 1959 amendments. Again as with the Circuit Court, the Supreme Court made it clear that the Act does not proscribe peaceful handbilling and other non picketing publicity even though such activity has a cease doing business object.

The Board has applied the Supreme Court's rationale in DeBartolo in a number of decisions concerning speech unaccompanied by non-speech conduct.[(11)] In Service Employees Local 399 (Delta Air Lines),[(12)] the Board found that a union's newspaper advertisements and handbilling of a neutral employers' potential customers to encourage a consumer boycott in furtherance of its primary dispute did not violate the Act because there was no violence, picketing, patrolling, or work stoppage. In that case, the union's primary dispute was with a nonunion janitorial service hired by Delta Airlines. The union distributed handbills on which: (1) Delta's name was prominently displayed; (2) Delta's accident and consumer complaint record was set forth; (3) the slogan appeared "It takes more than money to fly Delta. It takes nerve"; and (4) the public was urged not to fly Delta. In its initial decision[(13)] the Board held that the handbill violated the Act because under the proviso the Union didn't truthfully advise the public because it did not tell the public who the primary employer was. In addition telling the public of Delta's accident and consumer complaint record did not truthfully advise the public of the nature of the primary dispute. The Board held that information that attacks a secondary employer for reasons unrelated to Employer's role in the primary labor dispute is

not the type of information the proviso was addressing. On remand however, the Board, citing the Supreme Court's decision in DeBartolo II, held that the union did not engage in conduct proscribed by Section 8(b)(4) of the Act. In reaching its decision, the Board noted that "[t]here was no violence, picketing, patrolling or work stoppage,"(14) that "the handbilling was peaceful and did not cause interruptions in deliveries to Delta or refusals to work by employees of Delta or any other person", and that the union was attempting to persuade consumers not to patronize Delta.(15) Thus, the Board concluded peaceful handbilling and other non picketing publicity, even though it did not truthful advise the public of the nature of the primary dispute, was not proscribed by the Act.

In the instant case, we conclude that the Section 8(b)(4)(i)(ii)(B) charge be dismissed, absent withdrawal, under DeBartolo II, in that the Union's handbilling and display of its banners was pure speech unaccompanied by non-speech conduct. First, the Union did not engage in any conduct which would allow us to consider these banners as tantamount to picketing. In this regard, we note that the banners were unaccompanied by any patrolling or other non-speech activity which could be considered confrontational. We reject the Employers' argument that because the wording of the banners was misleading and false, that this made the action of displaying the banners per se confrontational and a clear attempt by the Union to affect the business operations of neutral employers. After DeBartolo II, it is clear that a Union may affect the business operations of neutral employers as long as it does so only with words, without picketing, patrolling or violence. There was no evidence presented of picketing or patrolling when the Union displayed the banners. Rather, the banners were simply held up by three or four Union members who occasionally passed out handbills which stated that Best was a "rat" contractor because it did not pay prevailing wages.

Second, the Union's conduct of handbilling and display of the banners is not "saved" by the proviso. The legislative history shows clearly that the proviso did not create an exception, but rather explained that consumer handbilling was not prohibited by the 1959 amendments. We must, therefore, also reject the Employer's argument that the statements on the banners, that the buildings were infested by vermin, violated the Act because these statements were untrue.

Third, there was no inducement of any individuals to strike or refuse to handle goods or perform services prohibited under 8(b)(4)(i). There were no allegations to that effect, and no evidence presented that any individual was induced to refuse to work by the Union's banners. Rather, the banners themselves stated that "we are not asking any person to stop work or refuse to make deliveries." Further, the handbills passed out by the Union clearly stated that the Union's primary dispute was with Best.

Finally, since there was no picketing involved here and no conduct which could be construed as picketing, there is no requirement that the Union adhere to a reserved gate system.(16) In light of our conclusions that there was no picketing, the Union did not violate the Act by refusing to govern its display of the banners by the rules applicable only to common situs picketing.

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.

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[1] All dates are in 1996 unless otherwise noted.

[2] The Hospital staff received inquiries from patients and family members of patients as to whether the hospital building was infested with rats.

[3] The Union is currently appealing this injunctive order.

[4] Evidence received by the Region indicates that the Union may have also handed out handbills near the reserved gate after July 18, 1996, which stated that the Employer was a "Rat Contractor" because it did not pay prevailing wages, or provide its employees with medical insurance.

[5] Denver Building & Construction Trades Council, 341 U.S. 675, 692 (1951).

[6] 273 NLRB 1431 (1985).

[7] 796 F.2d at 1334 n. 6.

[8] Id. at 1335.

[9] S. Doc No. 10, 86th Cong., 1st Sess. 3 (1959) reprinted in 1 Legislative History of the Labor-Management Reporting and Disclosure Act 0f 1959, at 82.

[10] 796 F.2d at 1344 quoting 105 Cong. Rec. 16,413-14 (1959), reprinted in 2 Leg.Hist at 1431-32.

[11] United Steelworkers of America, AFL-CIO-CLC (Pet, Inc.), 288 NLRB 1190 (1988). (Board found a union's consumer boycott of Pet and its divisions and subsidiaries in furtherance of its primary dispute with a wholly owned subsidiary of Pet, using newspaper advertisements, leafleting and other media was lawful even if Pet and its divisions and subsidiaries were neutrals. See also United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 32, AFL-CIO (Ramada, Inc.), 302 NLRB 919 (1991). (Board held the mere threat to handbill and organize a boycott cannot be found coercive).

[12] 293 NLRB 602 (1989).

[13] 293 NLRB 602 (1982).

[14] Id. at 603.

[15] Id. at 602.

[16] See Sailors Union of the Pacific, AFL, (Moore Dry Dock Company), 92 NLRB 547 (1950).